UNITED STATES

DEPARTMENT OF THE TREASURY

Director, Office of Professional Responsibility,

Complainant-Appellee

v. **COMPLAINT NO. 2004-9**

Kevin Francis,

Respondent-Appellant

Decision on Appeal

Under the authority of General Counsel Order No. 9 (January 9, 2001) and the authority vested in him as Assistant General Counsel of the Treasury who is the Chief Counsel of the Internal Revenue Service, through a series of Orders (most recently an Order dated January 15, 2008) Donald L. Korb delegated to the undersigned the authority to decide disciplinary appeals to the Secretary of the Treasury filed under Part 10 of Title 31, Code of Federal Regulations (Rev. 7-2002) ("Practice Before the Internal Revenue Service," sometimes known and hereafter referred to as "Treasury Circular 230").

This is such an Appeal timely filed by Respondent-Appellant, Kevin Francis, from the June 7, 2006 Opinion of Administrative Law Judge T. Todd Hodgdon (the "ALJ").[1] Respondent-Appellant's Appeal was filed on July 6, 2006 and Complainant-Appellee's Reply Brief was timely filed on July 31, 2006.[2]

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[1] A copy of the ALJ's Decision in these proceedings appears as Attachment A to this Decision on Appeal. A copy of the Decision on Appeal in Director, Office of Professional Responsibility v. Joseph R. Banister, Complaint No. 2003-2 (a proceeding made public by mutual agreement of the parties) appears as Attachment B to this Decision on Appeal. To the extent relevant to these proceedings, these Attachments are incorporated in this Decision on Appeal as if fully set forth herein.

[2] Respondent-Appellant also sought to file a "Reply Brief" on August 17, 2006 to which Respondent-Appellant was not entitled under Treasury Circular 230. No consideration was given to this document, and Complainant-Appellee was not accorded the opportunity to file a response to this document. These proceedings already contained the most exhaustive administrative record of any proceedings I have been asked to review as the Secretary's Appellate Authority under Treasury Circular 230. More is not needed.

I. Appellate Authority Functions in Treasury Circular 230 Proceedings

The Appellate Authority in Treasury Circular 230 proceedings such as this has a number of functions she/she must perform in reviewing the administrative record of a proceeding and the Decision of an Administrative Law Judge that forms the basis of an Appeal to the Appellate Authority. First, the Appellate Authority must review each of the alleged violations charged by the Director, Office of Professional Responsibility that form the basis of the Appeal to determine whether the Director, Office of Professional Responsibility, has met his/her burden of proof with respect to each element of the specific charged violation. Second, the Appellate Authority must examine the record to determine whether the Director, Office of Professional Responsibility has carried his burden of proof that the specific charged violation was "willful," or in the case of violations of §§ 10.33 or 10.34 of Treasury Circular 230, either "willful," "reckless," or "grossly incompetent." §§ 10.52(a) and 10.52(b) of Treasury Circular 230. [3]

The standard of proof that the Director, Office of Professional Responsibility must meet with respect to these two functions of the Appellate Authority differs depending on what sanction the Director, Office of Professional responsibility seeks to impose. If the Director, Office of Professional Responsibility, seeks to disbar a practitioner, or (as here) seeks to suspend the practitioner for 6 months or more, the Director, Office of Professional Responsibility, must carry his/her burden of proof by clear and convincing evidence, a higher standard of proof than proof by a mere preponderance of the evidence.

Third, the Appellate Authority must review each of the matters raised on Appeal to determine whether any matter raised on Appeal forms a basis for reversing or remanding the Decision of the ALJ.

In performing each of these three functions, the Appellate Authority is subject to the standards of review set forth in §10.78 of Treasury Circular 230, which provides that, except on issues that are exclusively matters of law (which are review by the Appellate Authority *de novo*), the Decision of the Administrative Law Judge is not to be reversed unless the Appellant proves that the ALJ's decision is

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[3] §§ 10.52(a) or 10.52(b) of Treasury Circular 230 impose specific additional proof requirements on the Director, Office of Professional Responsibility with respect to all charged violations of Treasury Circular 230 when the Director, Office of Professional Responsibility seeks to censure, suspend or disbar a practitioner. Hence I disagree with the ALJ's statement that only some sections of Treasury Circular 230 require the Director, Office Of Professional Responsibility to prove that practitioner conduct was "willful," at least if the sanction to be imposed is censure, suspension or disbarment. See Attachment A, page 3. I also disagree with the ALJ's statement that state disciplinary precedents rather than Federal tax cases ought to form the basis for determining whether practitioner conduct is "willful." I also disagree with the ALJ's statement that the Federal tax law standard of "willfulness" or "knowing" acts or omissions encompass conduct that the practitioner either "knew" or "should have known" was inappropriate. Only "knowing" acts or omissions are "willful" within the meaning of § 10.52(a) of Treasury Circular 230. Id. However, for the reasons mentioned later in this Decision on Appeal, that difference will make no difference in the outcome to be reached on the charges under examination. See discussion of "willful" and "knowing" at pp. 10-11, infra.

"clearly erroneous" in light of the evidence in the record and the applicable law. Neither the specific violations sustained by the ALJ in his Decision in these proceedings nor the question of whether Respondent-Appellant acted "willfully," "recklessly" or "through gross incompetence" with respect to any of the charges sustained by the ALJ involve issues that are solely a matter of law. Accordingly, in performing my first and second functions as Appellate Authority, I review the ALJ's decision applying a "clearly erroneous" standard. In reviewing the issues raised by Respondent-Appellant on Appeal, I will either apply a "clearly erroneous" standard of review (if the issue is factual or involves a mixed question of fact and law) or a *de novo* standard of review (if the issue is exclusively a matter of law).

II. The ALJ's Findings of Fact and Conclusions of Law with Respect to the Charges

In his Decision, the ALJ examines in detail the facts surrounding each of the charges that formed the basis for his sustaining the charges that formed the basis of his judgment that the Respondent-Appellant should be suspended from practice before the Internal Revenue Service for 2-1/2 years. The ALJ also set forth in detail the arguments advanced by the parties with respect each of the charges, and provided his findings of fact and conclusions of law with respect to each charge, including his view of the credibility of the various witnesses and his reasons for reaching his conclusions. Except to provide a brief summary of the charges and references to the pages in the ALJ's Decision where the ALJ discusses them, I generally will not repeat in this Decision on Appeal the discussions contained in the ALJ's Decision. I will depart from that general practice only where I feel further comment from me is required.

The ALJ's Decision is organized to set forth all charges relating to Respondent-Appellant's representation of a particular taxpayer(s) together within sub-headings relating to each representation. I will do the same.

A. Charges Pertaining to Respondent-Appellant's Representation of Corp. 1 (discussed at pp. 4-11 of the ALJ's Decision).

Respondent-Appellant was charged with violations of §§10.20(a) and 10.23 of Treasury Circular 230 relating to the following Information Requests directed to Respondent-Appellant with respect to Corp. 1:

1. **Date 1 letter from Revenue Officer "A" (Joint Exh. 47 requested that information be provided on or before Date 2);**

2. **Date 3 letter from Revenue Officer "A" (Joint Exh. 49 requested that information be provided on or before Date 4);**
3. **Date 5 telephone request for information by Revenue Officer "B" (Joint Exh. 51 – "B" notes of conversation, requesting information be submitted before a scheduled meeting);**

4. **Date 6 telephone request from Revenue Officer "B" (Joint Exh. 54, pp. 4-5);**

5. **Date 7 FAX from Revenue Officer "B" containing list of outstanding information request items, requesting that the information be provided by Date 8; and**

6. **Letter dated Date 9 from "C", Area 1 Territory Manager, extending the due date for outstanding information requests to Date 10, and indicating that a failure to provide the requested information by that date could lead the Internal Revenue Service to take enforced collection action, including levies, against Respondent-Appellant's clients (i.e., both Corp. 1 with respect to that entity's uncontested[4] employment tax liabilities, and the trust fund penalty liabilities of Corp. 1's controlling shareholders and their wives, Shareholder(s) 1 and Shareholder(s) 2. The Date 9 letter also informed Respondent-Appellant that, unless the requested information was provided, the Internal Revenue Service would be unable to resolve these matters other than through enforced collection action and could not consider either an Offer in Compromise or an Installment Payment Agreement with respect to these liabilities. In summarizing the Internal Revenue Service's more than 6 months of effort to obtain this information from Respondent-Appellant, the Date 9 letter said that the requested information was in many instances either not provided at all, was incomplete or was not timely provided.**

Respondent-Appellant offered several explanations for his non-responses, incomplete responses and untimely responses, all or most of which are discussed in the ALJ's decision, but a few of which merit further discussion.

First, Respondent-Appellant contended that his non-responses and incomplete responses were the result of his clients' failures to provide him some or all of the requested information. In several respects, Respondent-

[4] In submitting a proposed Offer in Compromise to the Internal Revenue Service, a taxpayer can base the proposed Offer either on doubts as to liability, doubts as to collectibility, or both. Based on the information contained in the administrative record, the liabilities in question did not involve doubts as to liability with respect to Corp. 1, and may not have ultimately involved doubts as to liability with respect to the trust fund penalty liabilities of Shareholder(s) 1 and Shareholder(s) 2 either. In his discussions with Internal Revenue Service personnel, Respondent-Appellant indicated a willingness to have Shareholder(s) 1 and Shareholder(s) 2 admit to liability for the trust fund penalties relating to Corp. 1 and asked Service personnel to provide documents which the Shareholder(s) 1 and Shareholder(s) 2 could sign admitting their liabilities for trust fund penalties. Internal Revenue Service personnel furnished the requisite documents to Respondent for the Shareholder(s) 1 and Shareholder(s) 2' signature, but duly executed documents were never submitted by either Respondent-Appellant or the Shareholder(s) 1 and Shareholder(s) 2.

Appellant's contentions were supported by the hearing testimony of Shareholder(s) 1 (Tr., pp. 959-1010). For the reasons stated in his Decision, the ALJ found that, notwithstanding Shareholder(s) 1's corroborating testimony, Respondent-Appellant's testimony lacked credibility and explained the factors that led him to that conclusion.[5]

Second, Respondent-Appellant explained that many of the information items requested were not in the possession or custody of Respondent-Appellant or his clients but rather could only be obtained from a third party.[6] Yet, beyond his testimony, Respondent-Appellant offered no evidence to support his claims that, at least in the case of information that could be obtained from Corp. 1's banks, any written requests for the information had been made to the banks by Corp. 1 with Respondent-Appellant's assistance.[7] Both administrative information requests and Internal Revenue Service summonses typically extend to any information items within the possession, custody or control of the parties to which they are directed. Information items in the possession or custody of Corp. 1's lawyers and banks would generally be obtainable by Corp. 1 and consequently would be within Corp. 1's control.

Respondent-Appellant correctly asserts that the Internal Revenue Service's authority to obtain information items through information requests and summonses generally does not require the subject of the request or summons to create anew a non-existent document containing the information items requested. However, if a representative agrees to prepare such a document and holds out the prospect of submitting such a document, and delays IRS personnel's access to underlying information that would permit them to prepare the document themselves (for example, a Form 433-A or

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[5] Both the ALJ's Decision and the testimony of Complainant-Appellee's witnesses show a lack of understanding of the ethical dilemma faced by practitioners when the failure is that of the client rather than the practitioner. To be sure, when asked a specific question about the reason why particular information has, in whole or in part, not been provided, absent some applicable privilege, the practitioner must provide an accurate, truthful and complete response. But when IRS employees fail to ask why requested information has not been provided, nothing in Treasury Circular 230 requires a practitioner to volunteer to the IRS information potentially harmful to his/her clients' interests. Doing so would cause the practitioner to violate the practitioner's duty of loyalty to his/her client. If IRS personnel want to obtain that information from the representative, they can include in their information requests language such as this: "If your response to any of these information item requests is not complete, indicate the ways in which the response is incomplete, the actions you have taken to date to obtain and provide the information, the further actions you intend to take to obtain and provide the remaining information, and the date(s) when you anticipate the remaining information will be provided to the Internal Revenue Service."

[6] For example, Corp. 1's articles of incorporation, by-laws, minute book and stock ledger were said to be in the custody of Corp. 1's lawyers, while the signature cards on the corporate bank accounts, cancelled checks and certain account-related information providing verification of the bank statements were said to only be available from Corp. 1's banks,

[7] Respondent-Appellant did not claim to have made repeated attempts to get the information items from Corp. 1's lawyers' custody and offered no other proof of having assisted Corp. 1 in making any such request.

Form 433-B), this limitation on the Service's authority does not provide a defense to the acts or omissions of a practitioner.

Having found that the ALJ's Findings of Fact and Conclusions of Law that Complainant-Appellee had established these violations of Treasury Circular 230 by clear and convincing evidence are not clearly erroneous, I AFFIRM the ALJ's Findings and Conclusions on these charges. I further find that the Complainant-Appellee has established that each of these violations were "willful" within the meaning of §10.52(a) of Treasury Circular 230.[8]

B. Charges Pertaining to Respondent-Appellant's Representation of Shareholder(s) 1 (discussed at pp. 11-16 of the ALJ's Decision). I AFFIRM the ALJ's Findings of Fact and Conclusions of Law that Complainant-Appellee had established by clear and convincing evidence that each of the misrepresentations cited constituted violations of §§10.51(f) and 10.51(i) of Treasury Circular 230. I find that the ALJ's Findings and Conclusions on these charges are not clearly erroneous. I further find that the Complainant-Appellee has established that each of these violations were "willful" within the meaning of §10.52(a) of Treasury Circular 230.[9] I further note my belief that these charges were perhaps the most serious charges leveled against Respondent-Appellant in these proceedings and clearly constituted an attempt by Respondent-Appellant to represent that he had reached a final agreement with the Internal Revenue Service on a lien subordination issue when, in fact, no such agreement had been reached.

C. Charges Pertaining to Respondent-Appellant's Representation of Corp. 2 (discussed at pp. 16-22 of the ALJ's Decision). The ALJ found that the Complainant-Appellee had met his burden of proof by clear and convincing evidence that Respondent-Appellant's acts and omissions constituted violations of §§ 10.20(a) (two violations), 10.23 (two violations), 10.22(a) (one violation), 10.22(b) (one violation) and 10.51(b) (one violation) of Treasury Circular 230 in connection with the following acts or omissions:

1. **Respondent-Appellant's failure to provide information requested by Revenue Officer "D" on Date 11 by Date 12 and Date 13, as requested (the basis for one of the §10.20(a) charges and one of the §10.23 charges);**
2. **Respondent-Appellant's failure to provide information requested by Revenue Officer "D" on Date 14 by Date 15, as requested (the basis for one of the §10.20(a) and one of the §10.23 charges); and**

[8] See discussion of "willful" and "knowing" at pp. 10-11, infra.
[9] See discussion of "willful" and "knowing" at pp. 10-11, infra.

3. Respondent-Appellant's alleged failure to exercise due diligence and alleged submission of false and misleading statements in connection with the Corp. 2 corporate income tax return for the taxable year ended Date 16, submitted to the Internal Revenue Service on Date 17 (the basis for the §§ 10.22(a), 10.22(b) and 10.51(b) charges).

In his Decision, the ALJ found that Complainant-Appellant had met his burden of proof by clear and convincing evidence as to each of these charges (Attachment A, pp. 18 and 22).[10] As to each charge, the ALJ found the testimony of Respondent-Appellant to lack credibility. I find the ALJ's Findings and Conclusions with respect to items 1 and 2 above not to be clearly erroneous. With respect to item 3 above, I also find that the ALJ's Findings and Conclusions are not clearly erroneous, both for the reasons set forth in the ALJ's Decision and for the reasons set forth below.

In preparing the Corp. 2's corporate tax return for the year ended Date 16, Respondent-Appellant was well aware that the information provided on that return perhaps would be reviewed not only by IRS personnel in both the Examination and Collection Divisions of the Internal Revenue Service. In choosing how to report any dispositions of assets on that return, it is simply not credible to suggest that the misleading entries on that return were forced upon Respondent- Appellant by the limited options offered by the Form 1120-S and its Instructions. A taxpayer (and derivatively, a practitioner assisting a taxpayer) can always attach a written statement to the return if they feel the information, as presented on the form, would be either incomplete or otherwise misleading, setting forth all they know, at the time the return is to be submitted, concerning the return treatment and what it was intended to represent. Respondent-Appellant failed not to do so. Given other facts in the record (the means used to arrive at the assets entered as "disposed of" and the Respondent-Appellant's inquiry concerning a "discharge petition" from the tax lien filed against Corp. 2's assets and Respondent-Appellant's failure to submit a discharge request leaves one to question whether this failure was inadvertent. At the least, this fact is added reason for finding that the ALJ's Findings and Conclusions on item 3 above are not clearly erroneous.

I further find that both the Findings and Conclusions with respect to items 1, 2 and 3 above provide clear and convincing evidence that Respondent-Appellant's acts and omissions were "willful" within the meaning of §10.52(a) of Treasury Circular 230.[11]

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[10] At p. 22 of the ALJ's Decision (Attachment A), the ALJ fails to include a reference to §10.52 in his conclusion that Respondent-Appellant made false statements with respect to the Corp. 2 corporate tax return for the taxable year ended Date 16. Given his findings on the issue, I find that omission to have been inadvertent.

[11] See discussion of "willful" and "knowing" at pp. 10-11, infra.

D. <u>Charges Pertaining to Respondent-Appellant's Representation of Client(s) 1 (discussed at pp. 22-33).</u> The Complainant-Appellee charged Respondent-Appellant with having violated §§10.20(a) (four alleged violations), 10.22(b) (two alleged violations)[12] and 10.23 (four alleged violations) in connection with Respondent-Appellant's acts and omissions in representing Client(s) 1.

The alleged §§ 10.20(a) and 10.23 violations relate to four information requests allegedly made on Date 18, Date 19, Date 20 and Date 21 relating to (1) an Offer in Compromise and supporting Form 656 prepared and submitted on behalf of the Client(s) 1 by Respondent-Appellant (Jt. Exh. 22), and (2) an "Offer on an Offer" and supporting Form 656 prepared by Revenue Officer "E", an "offer specialist," and sent directly to the Client(s) 1 for their signature by "F", the Manager of Offer Group #1, on Date 22 (Jt. Exh 23).[13] These charges pertain to: (A) confusion surrounding (1) the values of the investments contained in Client(s) 1's retirement plan(s), (2) whether Client(s) 1 had one or two such plans, (3) whether statements made by Respondent-Appellant to Revenue Officer "E" related solely the <u>value</u> of those investments (as Respondent-Appellant contends) or related both to "E"'s acknowledged inquiries concerning the <u>value</u> of those accounts and to purported inquiries. "E" made concerning the <u>amounts available for withdrawal</u> from those accounts (as Revenue Officer "E" contends), and (4) whether the terms of the plan(s) permitted withdrawals for these purposes; and (B) delays in timely obtaining copies of the plan documents to verify whether or not the funds were available for withdrawal for these purposes.

It was ultimately determined that Client(s) 1 had two retirement plans through his employer (Corp. 3). One of the plans was a Type 1 plan. This Type 1 plan had no provisions for hardship withdrawals or other plan provisions that would allow Client(s) 1 to access his plan benefits before retirement for the purpose of helping to fund an Offer in Compromise. Client(s) 1's second retirement plan, a 401(k) plan, allowed employee contributions and had limited amounts available to fund hardship withdrawals that could be made available to fund the Client(s) 1 Offer in Compromise. Indeed, it was this amount that was referenced at page 4 of Respondent-Appellant's Date 23 FAX to Revenue Officer "E" (Jt. Exh. 22, page 4).

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[12] During the times here relevant, §10.22(b) provided: "Each . . . enrolled agent . . . shall exercise due diligence: (c) In determining the correctness of oral and written representations made by him to the Department of the Treasury . . .."

[13] Respondent-Appellant contends that Client(s) 1 signed the Form 656 and submitted it to the Internal Revenue Service without discussing it with him. Indeed, he contends that he did not even know that the Form had been submitted to the Client(s) 1 for their signature until the "Offer on an Offer" was a *fait accompli*. Mr. "F"'s Date 4 letter contains no indication that Respondent-Appellant received a "cc" of this correspondence, providing some support for Respondent-Appellant's contentions.

With regard to whether Respondent-Appellant's or Revenue Officer "E"'s recollection of whether their conversations concerned only the value of the investments held in Client(s) 1's, or both those values and the amounts available to be withdrawn from his accounts, I find Respondent-Appellant's version of events the more credible. First, the information submitted to Revenue Officer "E" on Date 23 clearly contained both a valuation figure and a much smaller amount available for withdrawal. Second, in her direct testimony at the hearing, Revenue Officer "E" indicated that her conversations with Respondent-Appellant, at least those that occurred on Date 24, focused on the value of the investments held in Client(s) 1's account(s) (Tr. 84-85). Not until her rebuttal testimony did Revenue Officer "E" suggest that the figures she discussed with Respondent-Appellant were said to have been the same figure for both the value of the accounts and the amounts available for withdrawal. Given that she had already received information suggesting that the two figures were substantially dissimilar, I find Revenue Officer "E"'s testimony on this matter to lack credibility. In addition, given that the correspondence forwarding the revised Offer on the Offer and Revised Form 656 was sent directly to Client(s) 1 by "F" and that correspondence does not reflect that copies of the correspondence or its enclosures were sent to Respondent-Appellant, I find Respondent-Appellant's testimony that he did not aware of the Offer on an Offer or Revised Form 656 before their execution and acceptance credible, particularly given "E"'s testimony that the documents were signed by the Client(s) 1 and her refusal to testify that they were signed both by the Client(s) 1 and Respondent-Appellant.

There were undoubtedly unreasonable delays in getting the plan documents and other information pertaining to Client(s) 1's retirement plans to Revenue Officer "E". But I do not place much of the blame for that on Respondent-Appellant, perhaps because of my own frustrations in trying to extract retirement plan information from plan administrators while I was in private practice. Moreover, at various times relevant to these charges, both Respondent-Appellant and Revenue Officer "E" had to rely to Client(s) 1 in both getting information and interpreting the limited information he was being given by the plan administrator. As Counsel for Complainant-Appellant has suggested, Client(s) 1 had limited experience and understanding of these matters. If Respondent-Appellant and Revenue Officer "E" had cooperated in drafting a letter for the signatures of Client(s) 1, Respondent-Appellant and Revenue Officer "E" (or another appropriate Service employee) to be sent to the plan administrator(s) requesting, in specifics, the documents and other information requested, asking that copies of the documents and information be sent to each of them, and indicating that a third party summons would be issued for the information and documents if they were not received by a reasonable specified date, I suspect the information and documents would have been received far earlier and

would have given both Respondent-Appellant and Revenue Officer "E"a stronger factual basis on which to proceed.

I do not share the ALJ's skepticism concerning Respondent-Appellant's stated willingness to allow Revenue Officer to directly contact Client(s) 1 regarding his retirement plans. Revenue Officer "E" and Respondent-Appellant seemed to be facing a common problem: Corp. 3's failures to timely provide all the information and documents required by Revenue Officer "E". I also find the ALJ's statement that Client(s) 1 was unaware of the problem in getting the necessary information and documents from his employer to permit Revenue Officer "E" to verify the statements being made about the retirement plans until erroneous. The taxpayer was a necessary party in any communications between the plans' administrators, on the one hand, and Respondent-Appellant and Revenue Officer "E" on the other. By way of example, Employee 1 of the Corp. 3 Benefits Center, wrote to Client(s) 1, not to Respondent-Appellant, on Date 26 to provide an explanation of one of the plans (Jt. Exh. 24, p.2). Granted, that response was incomplete and offered no indication that a copy of even that plan had been provided to either Client(s) 1 or Respondent-Appellant. I find it inconceivable that either Client(s) 1 or Respondent-Appellant were in receipt of information from Corp. 3 that they failed to provide to Revenue Officer "E". It would not have been in either of their interests to fail to provide additional information or documents in their possession, custody or control on these matters to Revenue Officer "E" or her colleagues.

Based on the above, it is my belief that the ALJ's findings and conclusions that Complainant-Appellant had carried his burden of proof with respect to the Client(s) 1 charges by clear and convincing evidence were clearly erroneous. I therefore REVERSE the ALJ's findings and conclusions with respect to each of the Client(s) 1 charges.

E. Charges Pertaining to Respondent-Appellant's Representation of Client(s) 2 (discussed at pp.30-32). I affirm without further comment the ALJ's findings of fact and conclusions of law on the Client(s) 2 charges.

F. "Willful" and "Knowing" Conduct. As noted in footnote 3, infra, I find that the sanction proposed by Complainant-Appellee can be sustained only if Complainant-Appellee establishes by clear and convincing evidence that each of Respondent-Appellant's acts and omissions were "willful" within the meaning of §10.52(a) of Treasury Circular 230. I have also indicated my belief that the determination of whether conduct is "willful" should be made on the basis of Federal tax law precedents rather than on the basis of precedents interpreting similar language in state court reviews of disciplinary proceedings involving lawyers and certified public accountants. Id. I discussed the relevant Federal tax law precedents at length in the Decision on Appeal in the Banister case,

referred to in footnote 1, supra, which appears in its entirety as Attachment B to this Decision on Appeal. The discussion of the term "willful" appears at pp. 40-67 of the Decision on Appeal in Banister. Of particular importance in these proceedings is the distinction drawn by Mr. Justice White in Cheek between defenses based on an honest but mistaken and objectively unreasonable belief as to the meaning of substantive provisions of the Internal Revenue Code (where the Court ruled that in enacting the Code, Congress meant to negate the English common law rule presuming knowledge of the law, and substitute a series of specific intent standards) and defenses raising Constitutional claims (where the Court found the English common law presumption of knowledge of the law to remain inviolate). I find the charges in these proceedings to be of the latter variety, and on this basis find each of Respondent-Appellant's acts and omissions (other than the Client(s) 1 charges) to have been "willful."

III. Issues Raised By Respondent-Appellant on Appeal

In his timely filed Appeal, Respondent-Appellant asserted a number of alleged errors in these proceedings, falling into four broad categories. The first category, grouped by Respondent-Appellant into Group A, is composed 10 specific allegations and one general allegation relating to purported denials of Respondent-Appellant's due process rights. The second category, grouped by Respondent-Appellant into Group B, is composed of two specific allegations alleging that the ALJ applied erroneous legal standards in his Decision. The third category, which Respondent-Appellant denominated as Group A, alleges that the ALJ erred in not granting Respondent-Appellant's Motion to Strike, Motion for Summary Judgment and Motion for a Directed Verdict. The fourth category, grouped by Respondent-Appellant into Group D, is composed of six specific allegations with respect to the ALJ's findings of fact and conclusion of law relating to the charges against Respondent-Appellant.

I will address each of the issues raised by Respondent-Appellant in Groups A, B and C, infra. The issues raised in Group D are addressed in Section II of this Decision on Appeal, supra.

A. The Due Process Claims.

1. "Illegal" By-Pass and Browsing Claims. These claims are without merit. As noted in Section 2.D, supra, I have recognized where appropriate how the procedural irregularities in implementing the By-Pass of Respondent-Appellant in the Client(s) 1 matter contributed to the misdirection and delays in that matter. This was among the factors that led me to reverse the ALJ's finds of fact and conclusions of law on the Client(s) 1 matter. As to the "browsing" claim, I find that claim to be without merit. "Browsing" simply did not occur here. Rather, Internal Revenue Service employees were operating within the scope of their official responsibilities in looking into

other cases in which Respondent-Appellant acted as the representative where Service employees found his conduct to be potentially in violation of Treasury Circular 230.[14] I find the consideration of other troublesome cases in which a practitioner has been involved not only in cases involving "patterns of conduct" charges, but in other cases where examining a practitioner's conduct in other cases permits an ALJ to better assess the practitioner's credibility on matters involving contested material facts and the inferences to be drawn as to whether the practitioner's conduct was inadvertent or knowing.

2. Absence of Prompt Referral. This claim is without merit. Respondent-Appellant has asserted that the fact that taxpayers are subject to a general 3-year statute of limitations suggests that a similar statute of limitations should apply to Treasury Circular 230 proceedings. There is no basis in law for this claim, nor is there any other potentially applicable statute of limitations that would time bar even the longest delay set forth at pp. 12 and 13 of Respondent-Appellant's Brief on Appeal.[15]

3. Shifting Allegations. This claim is without merit and adds noting to
4. Respondent-Appellant's "Absence of Prompt Referral" claim. It is appropriate that Complainant-Appellee winnowed the charges to those he felt merited the ALJ's attention.

4. Denial of Discovery. This claim is without merit. A similar claim was raised in Banister and is discussed at length at pp. 94-96 of the Decision on Appeal in Banister (Attachment B). In particular, see the discussion of Washburn v. Shapiro, 409 F. Supp. 3 (S.D. Fla. 1976) at p.96.

5. Intimidation of Witnesses. The purported "intimidation" claim was

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[14] Respondent-Appellant has argued that the fact that front line Internal Revenue Service employees did not refer his conduct in their cases for consideration of Respondent-Appellant's conduct by the Office of Professional Responsibility was evidence that his conduct did not violate Treasury Circular 230. I do not find their failure to refer their cases to OPR as an endorsement of Respondent-Appellant's conduct. Rather, I think it demonstrates that the employees in question had so many primary functions to perform and so few resources with which to perform them that they had no ability to meet the secondary responsibilities of their jobs, even one as important as referring a practitioner to OPR when their conduct merited OPR's review.

[15] The longest delay, measure from the time of the conduct to the time the alleged violation was added to the OPR Complaint was 1,795 days. In another proceeding brought under Treasury Circular during a period in which the Decisions on Appeal in Treasury Circular 230 proceedings were not made public absent agreement of the parties and in which no such agreement was present, I had occasion to consider whether 28 U.S.C.§ 2462's general 5-year statute of limitation had application to Treasury Circular 230 proceedings instituted under 31 U.S.C. §330. I found that, generally, given the purposes of Treasury Circular 230 proceedings, the 5-year statute of limitations would not apply absent a finding that the primary purpose of a particular proceeding was shown to be penal as opposed to protective. Compare Johnson v. S.E.C., 87 F.3d 484 (D.C. Cir. 1996) and Profitt v. Federal Deposit Insurance Corporation ("FDIC"), 200 F.3d 855,(D.C. Cir. 2000), two cases involving primarily penal proceedings. In any event, a 5-year statute would require a time lapse of at least 1,825 days between the date of the alleged violation and the date the resulting chare was added to the Complaint.

based on two facts, neither contested. First, that IRS employees were told that if they decided they wanted to grant interviews to or Testify for Respondent-Appellant, they would have to do so on their own time. Second, that if they chose to be interviewed by or appear as a witness for Respondent-Appellant, they should exercise care to assure that they did not violate Section 6103 of the Internal Revenue Code or the Privacy Act. Neither of these statements provide a basis for a claim of "witness intimidation," and I see nothing wrong with counseling Service employees with regard to their obligations under the law. Like the ALJ, I am troubled by Complainant-Appellee counsel's unwillingness to work with Respondent-Appellant's counsel to arrange reasonable times for Respondent-Appellant's counsel to interview potential witnesses at their offices. The ALJ gave Respondent-Appellant's counsel additional time to attempt to conduct interviews of potential IRS witnesses and to convince them to testify near the end of the hearing, but Respondent-Appellant's counsel did not press the matter later in the hearing, perhaps because he found nobody willing to testify,[16] or perhaps because their testimony would not have been helpful to Respondent-Appellant. On this administrative record, I do not find these matters to be the "stuff" of reversible error grounded in a valid due process claim.[17]

6. Incomplete and Inaccurate FOIA Responses. Having reviewed the Respondent-Appellant's Motion to Supplement the Record and the Complainant-Appellee's Opposition thereto, I find this claim not to be the "stuff" of reversible error grounded in a valid due process claim.

7. The ALJ's Evidentiary Rulings. Respondent-Appellant makes a number of claims with respect to evidentiary rulings by the ALJ that kept testimony out of the hearing that would have allowed the ALJ to develop a more accurate view of whether the standards of conduct propounded by the IRS witnesses that persons in the practitioner community would even recognize (let alone have felt a duty to adhere to). Respondent-Appellant this resulted in a one-sided and inaccurate account of practitioner obligations, a fact made even more troubling by the ALJ's relative inexperience in Federal tax collection procedures. In particular, Respondent-Appellant took issue with the ALJ's decision not to permit him to call Expert 1 as an expert rebuttal witness on standards and practices in Federal tax collection procedure. The ALJ did not allow Expert 1 to testify, but did permit counsel for Respondent-Appellant to make an offer of proof which detailed what Expert 1 would have said had he been permitted to testify (Tr., pp. 1424-1428).

I state at the outset that I have no knowledge the degree of experience the ALJ has in Federal tax collection matters. I also note my

[16] The ALJ was without authority to compel them to testify.
[17] If Respondent-Appellant decides to pursue these matters in a United States District Court, the District Judge in those proceedings might elect to compel their testimony.

belief that the ALJ's understanding of these matters may have been improved had Expert 1 (or some other witness with a view differing from the IRS witnesses) could have been permitted to testify. I share Respondent-Appellant's concerns about one-sided explanations of difficult issues respecting practitioner conduct, particularly on matters such as those involved in collection matters where the nature of the perceptions of a practitioner's alleged failings are formed through the all too human prism of IRS employees' inability to admit their own failings that may have either caused or contributed to the problems being experienced.

Whatever the experience of the ALJ may be, suffice it to say that I am no neophyte in the Federal tax collection process, having represented corporations, other business entities and individuals in all variety of collection matters, large and small. I also have significant experience in representing debtors, secured and general creditors, and classes of creditors in informal workouts, Federal and state receiverships, and Federal Bankruptcy proceedings. Rather than reversing and remanding this matter to the ALJ, I will address below each of the 8 areas that Respondent-Appellant's counsel suggested would have been the subject of Expert 1's testimony, and then determine whether the exclusion of Expert 1's testimony has so prejudiced Respondent-Appellant's case as to constitute reversible error.

First, Expert 1 would have testified that return preparation does not constitute practice before the Internal Revenue Service. While I agree, I find that fact irrelevant. Respondent-Appellant is authorized to practice and in fact had practiced as an Enrolled Agent authorized to practice before the Internal Revenue Service. That jurisdictional requirement having been established, in determining a practitioner's continued fitness to practice before the Internal Revenue Service, violations of Treasury Circular 230 are not limited to acts and omissions falling solely within the definition of "practice before the Internal Revenue Service. See discussion at pp. 10-18 of the Banister Decision on Appeal (Attachment B). This claim is without merit.

Second, Expert 1 would have testified that, with respect to the preparation of the Form 4797 in the Corp. 2 case, obtaining a list of currently held assets and pulling invoices for assets no longer held would meet or exceed normal diligence under the circumstances. I would describe this statement as a partial truth. It does not explain why Respondent-Appellant did not prepare an attachment to the return/schedule describing the methodology used and the fact that he thought at the time the return/schedule was prepared that all assets not in the possession of Corp. 2 at its new location had been abandoned before or on the date Corp. 2's prior lease ended (a belief later found to have been erroneous as to an asset sold to Corp. 2's prior landlord, either because the asset sold to the landlord had not been abandoned on the date of Corp. 2 move or by Date 6 or because the

asset in question had been sold to the old landlord by Date 6. Further, in determining the significance of these omissions, it is appropriate to keep one other thing in context. The return/schedule in question was filed with Collection Division employees looking at the return as one of the significant items being reviewed in connection with the Corp. 2 collection case. Among the concerns of a Revenue Officer is assuring that assets that are subject to a Federal tax lien do not disappear from the possession, custody or control of the taxpayer/debtor. Given Respondent-Appellant's prior inquiries concerning the procedures for obtaining a lien discharge and the failure to subsequently apply for a discharge, one need not be a particularly suspicious person to conjure up scenarios that would lead commercial creditors to consider the possibility of a tortuous misstatement of fact leading to harmful reliance by a person entitled to rely upon the accuracy of the statement, or to a fraudulent conveyance of assets in which a creditor had a secured interest. In this context, I find Expert 1's statement at the least incomplete and perhaps misleading. In either event, I find that this claim lacks merit.

Third, Expert 1 would have testified that a practitioner has no obligation to provide his work product for which he had not been paid (in this case, a financial statement and a general ledger) to the Internal Revenue Service when it relates to a subject within the scope of his Power of Attorney until it is summoned. The ALJ addresses at p. 32 of his Decision the fact §10.28 did not exist as of the date of Respondent's conduct and that the circumstances of this case do not fall within the scope of §10.28 even after it became effective. I concur in the ALJ's statements. Had the issue been addressed by Expert 1's proposed testimony, I would have agreed that, absent an undertaking to do so on behalf of a taxpayer, a practitioner has no obligation to create a document that does not exist at the date of the request. I find no authority that supports the assertion that a practitioner has no obligation under Treasury Circular 230 to provide non-privileged documents prepared by the practitioner to the Internal Revenue Service pursuant to a lawful request prior to the date on which that request took the form of a summons. So I disagree with the position attributed to Expert 1. Further, I find that a document contained in a computer's hard drive is an existing document. I therefore find these claims to be without merit.

Fourth, Expert 1 would have testified that Respondent-Appellant should not be disciplined for a failure to provide a Form 433 to the Internal Revenue Service because the obligation to provide that Form is that of the taxpayer, not the practitioner. Certainly, providing the Form 433 is <u>primarily</u> the responsibility of the taxpayer. However, this fact does not excuse a practitioner from secondary responsibility for preparing and submitting the Form during a period covered by his/her Power of Attorney when he/she has agreed to do so, particularly when his/her undertaking is communicated to the Internal Revenue Service. I find this claim without merit.

Fifth, Expert 1 would have testified that it would have been appropriate in the Corp. 2 case for Respondent-Appellant to authorize direct contacts by IRS employees with Corp. 2 without withdrawing as Corp. 2's authorized representative. I agree but do not see the relevance of the matter to any of the charges in the Corp. 2 case, except insofar as this misunderstanding by IRS personnel either caused or contributed to the delays in the case. While I do not find that this claim constitutes reversible error, I do believe that this fact is appropriately considered as a mitigating factor and I will take it into account in determining the appropriate sanction to apply in these proceedings.

Sixth, Expert 1 would have testified that Respondent's furnishing correct "amount available for withdrawal" information in the Client(s) 1 case alone constituted "due diligence" in that matter. I disagree. Respondent-Appellant owed a further obligation to the IRS to assist IRS employees in their efforts to secure the information and documents necessary to permit them to verify the figures being provided by Corp. 3. Having REVERSED the ALJ on all the Client(s) 1 charges, I see no need to further discuss this claim.

Seventh, Expert 1 would have testified no practitioner would understand that a failure to provide information in connection with an Offer in Compromise application could subject them to discipline under Treasury Circular 230, I can only say that this practitioner would have. Depending on the circumstances, failing to live up to any commitments made to provide requested information could at a minimum cause the Service to unnecessarily expend scarce compliance resources, and might also cause Service personnel to forestall forced collection actions to the prejudice of the Federal fisc.

Eighth, Expert 1 would have testified that any suggestion that a practitioner has an obligation to inform the IRS that the taxpayer failed to provide requested information or documents "is nonsense," and that a practitioner's obligation is to his client. With modifications, I agree. As I have stated elsewhere in this Decision on Appeal, an authorized representative has no obligation to volunteer that information to the IRS without being asked. But absent an applicable privilege or another valid defense to the request, if asked, an authorized representative has an obligation to respond to such inquiries accurately, truly and completely, even if his/her response may be harmful to his/her client's interests. But that obligation does not exist unless the IRS first elicits the information or requests the documents. Where relevant to the specific charges made, I have discussed this issue in Section II, supra. The claim merits no further separate consideration here.

Given my consideration of these claims on Appeal, I do not feel that the ALJ's failure to permit Expert 1 to testify constitutes reversible error.

Independent of the issues that would have been raised by Expert 1 had he been permitted to testify, Respondent-Appellant claims that the ALJ erred by failing to allow the introduction of testimony concerning a large number of cases in which Respondent-Appellant had helped taxpayers successfully resolve collection matter with the IRS. Respondent-Appellant argues that an examination of those cases is relevant to the question of whether Respondent-Appellant has engaged in patterns of inappropriate conduct in his dealings with the IRS. Yet none of the charges made by OPR involve pattern offenses. My review of the administrative record and the ALJ's Decision leads me to conclude that the primary impact of the multiple cases examined was to influence the ALJ's view of Respondent-Appellant's credibility. The fact that Respondent-Appellant did not consistently violate Treasury Circular 230 when representing taxpayers is not evidence of the fact that he did so with sufficient frequency to draw into question any claim that he regularly complied with his Treasury Circular 230 obligations, any more than the fact that millions of Russians avoided the gulag can be cited as relevant evidence that Josef Stalin was really a good guy. The ALJ's action excluding this testimony did not constitute error, let alone reversible error.

8. The ALJ should have been someone with a tax background. ALJs are purposely selected from a pool of ALJs at other Federal Agencies and Departments to ensure that one person with important functions in the overall Circular 230 proceedings is, in both fact and perception, totally independent of the Internal Revenue Service. A necessary consequence of selecting such individuals to act as the ALJs in these proceedings is having ALJs that have not spent nearly all of their professional lives in the arcane pursuit of understanding our Federal tax laws. In the Treasury Circular 230 process, tax expertise is normally provided by the Secretary of the Treasury's Appellate Authority who have been employees of the Department of the Treasury or the Internal Revenue Service who have been selected because of their integrity and stubborn independence, and because we have spent substantial portions of our careers as practitioners of our "dark art." At some point in the process, therefore, practitioners get their cases reviewed by a tax expert. This claim is without merit.

9. Incompetent Evidence. As Respondent-Appellant admits, this claim is a rehash of an earlier claim already addressed. I see no need to comment further on the same claim offered in a different wrapper.

10. The Exclusion of the Witness 1 and Expert 1's Testimony. These claims are adequately addressed through my consideration of the proffered testimony of Expert 1. In light of my consideration, I find that the ALJ's exclusion of this testimony does not constitute reversible error.

11. Cumulative Effect. This claim merits no independent consideration.

B. The Erroneous Legal Standard Claims

1. Incorrect Standard of Willfulness. This claim is addressed at pp. 10-11 of this Decision on Appeal and in the cited pages appearing in the Banister Decision on Appeal (Attachment B). While I agree that the ALJ applied the wrong legal standard for determining "willful" conduct, I affirm each of the ALJ's findings and conclusions under the appropriate standard of "willfulness." Accordingly, this claim lacks merit.

2. Incorrect Standard for Clear and Convincing Evidence. Certain aspects of this claim have been discussed elsewhere in this Decision on Appeal. I choose to comment on only one aspect of this "cluster" of inter-related assertions, that a practitioner cannot be held responsible for failures to furnish information and documents that are not within the practitioner's possession, custody, or control where the failures are caused by the taxpayer or a third party and not by the practitioner. Assuming the practitioner can demonstrate that to be the case and that he has exercised due diligence in obtaining the information and documents from the person who possesses them, I concur. But the problem Respondent-Appellant faces is that the ALJ found Respondent-Appellant's evidence on this subject to lack credibility – not just in part but in whole. And in most instances, the administrative record on these matters contains ample evidence to support the ALJ's determinations of credibility under my standards of review. Accordingly, I find these claims to be without merit under my standards of review.

C. Denial of the Respondent-Appellant's Motion to Strike, Respondent-Appellant's Motion for Summary Judgment and Respondent-Appellant's Motion for a Directed Verdict. I find these claims to be without merit.

IV. Sanction and Conclusion

In view of the totality of the above, I reduce the period of Respondent-Appellant's suspension from 2-1/2 years to 1-1/2 years, commencing on the date of entry of this Decision on Appeal. This Decision on Appeal constitutes FINAL AGENCY ACTION in these proceedings.

David F. P. O'Connor
Special Counsel to the Senior Counsel
Office of Chief Counsel
Internal Revenue Service
(As Authorized Delegate of
Henry M. Paulson, Jr.
Secretary of the Treasury)

February 4, 2008
Washington, D.C.